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Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

RAYMOND FOXGORD, et al.,
Petitioners,

VS.

BARON HERBERT HISCHEMOELLER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT E. AITKEN*
JOSEPH D. MULLENDER, JR.
HARMAN M. HITT
DIANE L. MALCOLM
BALL, HUNT, HART, BROWN AND BAERWITZ
211 East Ocean Boulevard
Long Beach, California 90801
(213) 435-5631
ANTHONY F. PUHR
Law Offices of Anthony F. Puhr
8350 Wilshire Boulevard, Suite 309
Beverly Hills, California 90211
(213) 845-5172

Counsel for Respondent
Baron Herbert Hischemoeller

*Counsel of Record

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600

QUESTIONS PRESENTED

The first question stated by Petitioners should be restated as follows:

> Does a United States District Court have subject matter jurisdiction pursuant to 28 U.S.C. § 1351 in a civil action against an "honorary consul" of a foreign state, when the "honorary consul" is an American citizen and resident and the suit involves the personal business of the defendant?

The second question should also be restated:

> Can federal subject matter jurisdiction be conferred by consent of the parties?

PARTIES TO THE PROCEEDING

Respondent adopts Petitioners' statement of the parties, and additionally states:

There are no known parent companies, subsidiaries, or affiliates of the corporate parties in addition to the parties listed.

Respondent is a Debtor in a Chapter 11 proceeding pending in the United States Bankruptcy Court for the Central District of California. (No. LA86-00340-BR). Respondent's counsel has been authorized by the Bankruptcy Court to represent the Respondent in this proceeding.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
1. Facts Giving Rise to the Foxgords' Claim Against Hischemoeller	2
2. Decision of the District Court	2
3. Respondent's Contentions	3
4. The Decision of the Court of Appeals	3
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. A United States Citizen Who Holds the Title of "Honorary Consul" Is Not Consul Within the Meaning of 28 U.S.C. § 1351	4
II. Litigants Cannot Confer Subject Matter Jurisdiction on a Federal Court	9
CONCLUSION	11

TABLE OF AUTHORITIES

Cases

	Page
Augustini v. De Antueno, 99 N.Y.S.2d 245, 199 Misc. 191 (N.Y. Muni.Ct. 1950)	7
Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984)	6
Burlington Northern R.R. Co. v. Oklahoma Tax Comm'r., . U.S. ., 107 S.Ct. 1855, 95 L.Ed.2d 404 (1987)	5
Foxgord v. Hischemoeller, 820 F.2d 1030 (1987)	3, 4, 5, 6
Gulf Offshore Company v. Mobile Oil Corp., 453 U.S. 573, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1962)	9
General Atomic Company v. United Nuclear Corp., 655 F.2d 968 (C.A. 9th 1981), *cert. denied* 455 U.S. 948, 102 S.Ct. 1449, 71 L.Ed.2d 622	10
International Longshoreman's Association, AFL-CIO v. Davis, ____U.S.____, 106 S.Ct. 1904, 90 L.Ed.2d 389 (1986)	9
Millward v. McSaul, 17 Fed.Cas. 425 (1846)	7
Mitchell v. Maurer, 293 U.S. 237, 55 S.Ct. 162, 79 L.Ed 338	10
Ohio ex rel. Popovici v. Agler, 280 U.S. 379, 50 S.Ct. 154, 74 L.Ed. 589 (1930)	7
Reubin v. United States, 449 U.S. 424, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981)	5
Scott v. Breeland, 792 F.2d 925 (C.A. 9th 1986)	10
State v. Killeen, 39 Or. App. 365, 592 P.2d 268 (1979)	7
State v. Flores, 197 Minn. 590, 268 N.W. 194 (1936)	7
Sosna v. Iowa, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed. 2d 532 (1975)	9
Stockman v. La Croix, 782 F.2d 584 (C.A. 7th 1986)	9

Table of Authorities

Cases

	Page
Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), judgment vacated on other grounds, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480	10
Tennessee Valley Authority v. Hill, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978)	5
Thomson v. Gaskill, 315 U.S. 442, 62 S.Ct. 673, 86 L.Ed. 951 (1942)	10

Constitution

United States Constitution, Article III, Sec. 2	6

Statutes

United States Code,	
Title 12, § 1464(d)(15)(1982)	5
§ 1730(r)(4)(1982)	5
§ 3201(4)(1982)	5
Title 28, § 1351	1, 2, 3, 4, 5, 6, 7, 8, 11
Title 36, § 343(1982)	5

Textbook

13 Wright, Miller & Cooper, Federal Practice Procedure: Jurisdiction § 2d 3522	9

Treaties

1963 Vienna Convention on Consular Relations Article 71	6

No. .....

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RAYMOND FOXGORD, et al.,
Petitioners,

VS.

BARON HERBERT HISCHEMOELLER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent, Baron Herbert Hischemoeller ("Hischemoeller") opposes the petition of Raymond Foxgord, et al. ("Foxgords") to this Court to issue a Writ of Certiorari to review a decision of the Ninth Circuit Court of Appeals issued June 3, 1987 and reported at 820 F.2d 1030. That decision reversed an unreported decision of the District Court. The District Court awarded damages to petitioners and denied respondent's motion to vacate the judgment for lack of subject matter jurisdiction. The Court of Appeals reversed with directions to dismiss for lack of subject matter jurisdiction. The only basis for jurisdiction was 28 U.S.C. § 1351 providing for jurisdiction of suits against a "consul or vice-consul." The Court of Appeals held that an American citizen serving as an "honorary consul" in the United States for another coun-

try is not a "consul or vice-consul" under 28 U.S.C. § 1351.

STATEMENT OF THE CASE

1. Facts Giving Rise to the Foxgords' Claim Against Hischemoeller.

Nicholas Gil Baxter ("Baxter") held an option on undeveloped gypsum claims. (AER 19). Henry Perdon ("Perdon") obtained Baxter's option. (*Id.*). Perdon exercised the option to purchase the claims in the name of his corporation, Transamerican Minerals, Ltd. ("Transamerican").

Transamerican borrowed the $500,000 option purchase price from Dr. and Mrs. Raymond Foxgord, who in turn borrowed the money from New Century Financial Corporation. (AER 51-55). In return, Transamerican gave the Foxgords a promissory note for $675,000 payable in one year. (AER 55). Hischemoeller and his corporation, HISMOCO, Inc., Perdon and Arthur Webb agreed to guarantee Transamerican's promissory note to the Foxgords. (AER 54). Perdon and Transamerican thereafter defaulted on the promissory note and consulting agreement. (AER 56).

2. Decision of the District Court.

The Foxgords instituted this action in the District Court against Perdon, Webb, Hischemoeller, HISMOCO, and Transamerican, claiming fraud and breach of guarantee. The District Court found for the Foxgords and entered judgment against the defendants for $1,549,642 (less credit of $12,050) and punitive damages of $100,000 against Hischemoeller. (AER 62-63). Only Hischemoeller appealed.

3. Respondent's Contentions.

In addition to lack of subject matter jurisdiction, Hischemoeller claimed, among other things: (1) that the note had in fact been paid by an assignment to the Foxgords of all of the stock of Transamerican; (2) that the guaranty was exonerated by agreements between Transamerican and the Foxgords to extend the time of payment; and (3) that the promissory note was, in any event, usurious. The note was admittedly usurious. The amount loaned was $500,000. The amount due in one year was $675,000, plus interest at 20 percent per annum, plus $10,000 per month for "consulting services".

4. The Decision of the Court of Appeals.

The Court of Appeals reversed the judgment of the District Court because of lack of subject matter jurisdiction. *Foxgord v. Hischemoeller*, 820 F.2d 1030 (1987). The court held that the District Court did not have subject matter jurisdiction under 28 U.S.C. § 1351 in a suit against an American citizen and resident involving a personal business transaction merely because the defendant had been appointed as an "honorary consul" of another country. (*Id.*).

SUMMARY OF ARGUMENT

The petition for certiorari should be denied. The questions presented do not warrant review. The Court of Appeals correctly held that an "honorary consul" is not a "consul or vice-consul" under 28 U.S.C § 1351. There are no conflicting decisions. An American citizen who holds the honorary title of consul is not amenable to suit in a federal court regarding his private, business affairs.

Petitioners' contention that a litigant can confer subject matter jurisdiction by consent is not tenable. Subject matter jurisdiction cannot be created by consent. The petition should be denied because the District Court did not have subject matter jurisdiction under 28 U.S.C. § 1351, and because the litigants cannot confer subject matter jurisdiction.

ARGUMENT

I.

A United States Citizen Who Holds the Title of "Honorary Consul" Is Not Consul Within the Meaning of 28 U.S.C. § 1351.

Petitioners argue that because respondent holds the title of "honorary consul" of the Ivory Coast, the District Court had jurisdiction under 28 U.S.C. § 1351. It is admitted that there is no other basis for federal subject matter jurisdiction. The parties to the action are both residents of California preventing any diversity of citizenship. There is no federal question involved.

The opinion of the Ninth Circuit states why an "honorary consul" does not come within the ordinary, common meaning of the word consul. *Foxgord v. Hischemoeller, supra,* 820 F.2d 1030. Consul and "honorary consul" are not synonymous in the international community. Moreover, the acts were private and not done in the course of respondent's consular duties. If Congress had intended "honorary consuls" who are American citizens to come within the ambit of 28 U.S.C. § 1351 it would have expressly so provided. As the Court of Appeals said, the doctrine "expressio unius est exclusio alterius" applies in this situation. The statute does not refer to "honorary

consuls" though "Congress is cognizant of the significance of labeling a position honorary. 12 U.S.C. §§ 1464(d)(15), 1730(r)(4), 3201(4)(1982) (referring to "honorary director"); 36 U.S.C. § 343 (1982) (referring to "honorary president")". *Foxgord v. Hischemoeller*, *supra*, 820 F.2d 1030, 1035.

The reasons for permitting federal courts to exercise exclusive jurisdiction in cases involving ambassadors, other public ministers and consuls was to perpetuate harmony between the United States and foreign powers to secure uniformity of decision and avoid local bias against foreign citizens. Intercourse with foreign nations could be affected by federal court decisions. An action against an American citizen who serves as an "honorary consul" for another country arising from non-consular transactions would have minimal adverse affects on the appointing sovereign. Avoidance of local bias is not present in a private action against an American citizen who holds the title of "honorary consul".

The term "consul or vice-consul" as used in 28 U.S.C. § 1351 does not include an American citizen serving as "honorary consul" for another country involving his own commercial transactions. "Honorary consul" is not synonymous with consul. This statute is unambiguous. It only applies to foreign consul acting as consul.

Once the plain meaning of a statute is clear, judicial inquiry is complete. *Burlington Northern R.R. Co. v. Oklahoma Tax Comm'r.*, ____U.S. ____, 107 S.Ct. 1855, 1860, 95 L.Ed.2d 404 (1987), quoting *Reubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981); *see also Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 n. 29, 98 S.Ct. 2279, 2296 n. 29, 57 L.Ed.2d 117 (1978). Only if the statutory language is unclear will judicial inquiry into the legislative history be necessary.

Blum v. Stenson, 465 U.S. 886, 896, 104 S.Ct. 1541, 1547, 79 L.Ed.2d 891 (1984).

Here, the Court of Appeals found the statutory language to be unambiguous. However, because other nations may have erroneously assumed that "honorary consuls" were covered by 28 U.S.C. § 1351, and because of the potential impact of the decision upon foreign countries in the selection of persons to serve as their consulates in the United States, the court explained the historical basis for Congress' determination that protection afforded by 28 U.S.C. § 1351 should be limited to consuls. *Foxgord v. Hischemoeller, supra*, 820 F.2d 1030.

As stated in the decision below the Framers of the Constitution were concerned only with the rights of foreign consular representatives when they created the constitutional basis for 28 U.S.C. § 1351 in Article III, section 2 of the Constitution. Respondent does not fit the category of foreign consul or representative because he is an American citizen acting as an "honorary consul".

There is a distinction between "honorary consul" and "consul or vice-consul". There is nothing in the legislative history of 28 U.S.C. § 1351 which reveals that Congress intended "honorary consuls" who are American citizens to come within the meaning of "consuls or vice-consuls". Moreover, to do so would be contrary to the 1963 Vienna Convention on Consular Relations ("V.C.C.R."), to which the United States has been a signatory nation since 1969. Under the provisions of that treaty, "honorary consuls" who, like Hischemoeller, are citizens or presidents of the receiving state are accorded *no* immunity from civil suits relating to acts outside the scope of their consular duties. V.C.C.R. Article 71.

In *Millward v. McSaul*, 17 Fed.Cas. 425 (1846), the court held that a citizen of the United States acting as a consul in another country on behalf of the United States does not fall within the statute which is the predecessor to 28 U.S.C. § 1351. *Id.* It was stressed in that case that the party was not acting within his official capacity thus divesting the federal court of subject matter jurisdiction. Logically a United States citizen with an honorary title of consul from another country acting on his own behalf would also not fall within the statute.

"Statutes do not purport to exclude the state courts from jurisdiction except where they grant it to the Courts of the United States". *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383, 50 S.Ct. 154, 155, 74 L.Ed. 589 (1930). There, this Court held that a state court could exercise jurisdiction over a case involving a consul when the subject matter was divorce. Other exceptions have been found where the subject matter was paternity (*State v. Flores*, 197 Minn. 590, 268 N.W. 194 (1936)) and unlawful detainer. (*Augustini v. De Antueno*, 99 N.Y.S.2d 245, 199 Misc. 191 (N.Y. Muni.Ct. 1950). Likewise, when an "honorary consul" is involved, even if he were acting in his official capacity, it has been held that a state court has jurisdiction. *State v. Killeen*, 39 Or.App. 365, 592 P.2d 268 (1979). Thus, state courts are not divested of jurisdiction to hear a cause of action when one of the litigants is consul.

State v. Killeen, supra, 592 P.2d 268, is the only case discussing "honorary consul". The federal statute which gave the United States District Court exclusive jurisdiction over all actions and proceedings against "consuls or vice-consuls" of foreign states, did not divest the state court of jurisdiction over a consular official charged with a violation of state law, when such violation was not

committed during the performance of his official consular duties. *Id.* The court stated:

> . . . Absent an expressed treaty provision to the contrary, consuls do not enjoy the plenary insulation from the judicial procedures of the receiving state (*i.e.*, country) which ambassadors or ministers enjoy; they are subject to the jurisdiction of the receiving state except "in respect of acts performed in the exercise of consular functions." 1963 Vienna convention, 21 UST 103, Articles 41, 43. *"Accord," Carrera v. Carrera*, 84 U.S.App.D.C. 333, 174 F.2d 496 (1949) . . . Moreover, *the privileges* and *immunities of honorary consuls* , who, unlike career consuls, are generally citizens of the United States and are designated by the sending state for the conduct of commercial or other limited functions, *have been frequently held to be even more circumscribed than the immunities of career consuls.* . . . In summary, whatever the outer limits of the immunity of consuls from prosecution may be, the weight of authority is that that *immunity does not extend to acts which are not performed in the exercise of official consular duties*, as defined in applicable treaties and by reference to general law regarding consular functions and privileges. *Id.* at 271. (Emphasis added).

It is apparent from this statement and from the decision below that the functional privileges and immunities of "honorary consuls" are more restrictive than those of career consuls. Congress did not intend that they be included within the meaning of "consuls or vice-consuls" under 28 U.S.C. § 1351. Moreover, if jurisdiction was vested in the court it would not extend to the private commercial transactions of an "honorary consul".

II.

Litigants Cannot Confer Subject Matter Jurisdiction on a Federal Court.

Federal court jurisdiction is not exclusive unless Congress chooses to make it so either expressly or by fair implication. *International Longshoreman's Association, AFL-CIO v. Davis*,____U.S.____, 106 S.Ct. 1904, 1910, 90 L.Ed.2d 389 (1986); *Gulf Offshore Company v. Mobile Oil Corp.*, 453 U.S. 573, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1962); 13 Wright, Miller & Cooper, Federal Practice Procedure: Jurisdiction § 2d 3527, pp. 241-242.

Federal courts are courts of limited jurisdiction. Parties cannot confer jurisdiction on a federal court that has not been vested in that court by the Constitution and Congress. The parties cannot waive lack of jurisdiction by express consent, conduct, or estoppel. *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975); *Stockman v. La Croix;* 782 F.2d 584 (C.A. 7th 1986); 13 Wright, Miller & Cooper, *supra,* § 3522, p.66.

State courts are courts of general jurisdiction. The presumption is that state courts have subject matter jurisdiction over a particular controversy unless a showing is made to the contrary. 13 Wright, Miller & Cooper, *supra,* § 3522.

Petitioners would have this court believe that litigants can consent to subject matter jurisdiction. However, a litigant cannot consent to subject matter jurisdiction. *Sosna v. Iowa, supra*, 419 U.S. 393; *Stockman v. La Croix, supra*, 782 F.2d 584, 13 Wright, Miller & Cooper, *supra,* § 3522. Indeed, it would be an unconstitutional invasion of the powers reserved to the states if the federal courts were to entertain cases not within their jurisdiction.

There is a presumption that a federal court lacks jurisdiction in a particular case until it has been demonstrated that jurisdiction over the subject matter exists. *General Atomic Company v. United Nuclear Corp.*, 655 F.2d 968 (C.A. 9th 1981), *cert. denied* 455 U.S. 948, 102 S.Ct. 1449, 71 L.Ed.2d 622. Petitioners have not demonstrated that the case comes within the competence of the court. *Thomson v. Gaskill,* 315 U.S. 442, 62 S.Ct. 673, 86 L.Ed. 951 (1942); *Scott v. Breeland*, 792 F.2d 925 (C.A. 9th 1986).

Even if a party remains silent as to jurisdiction, a federal court, whether trial or appellate, is obliged to notice on its own motion the lack of its own jurisdiction or the lower court's lack of subject matter jurisdiction when a case is on appeal. *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), judgment vacated on other grounds, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480. This Court has stated:

> An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review.

Mitchell v. Maurer, 293 U.S. 237, 244, 55 S.Ct. 162, 165, 79 L.Ed. 338 (1934).

Federal Rule 12(h)(3) states:

> Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Therefore, a lack of subject matter jurisdiction can be raised at any time, even on appeal.

The Court of Appeals decided there was no subject matter jurisdiction in this case. It is unnecessary and fruitless for this Court to decide this fundamental princi-

ple again. The District Court had no subject matter jurisdiction under 28 U.S.C. § 1351 to hear the case.

CONCLUSION

Respondent respectfully requests that the Petition for Writ of Certiorari be denied for the reasons discussed above.

DATED: November 20, 1987

ROBERT E. AITKEN*
JOSEPH D. MULLENDER, JR.
HARMAN M. HITT
DIANE L. MALCOLM
BALL, HUNT, HART, BROWN AND BAERWITZ
211 East Ocean Boulevard
Long Beach, CA 90801
(213) 435-5631

ANTHONY F. PUHR
Law Offices of Anthony Puhr
8350 Wilshire Boulevard
Suite 309
Beverly Hills, CA 90211
(213) 854-5172

Counsel for Respondent
Baron Herbert Hischemoeller

*Counsel of Record

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

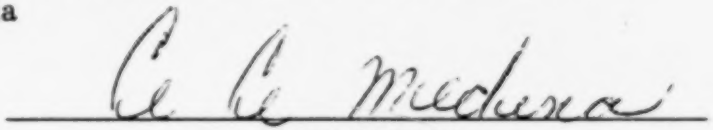
On November 25, 1987 I served the within Opposition to Petition for Writ of Certiorari in re: "Raymond Foxgord vs. Baron Herbert Hischemoeller" in the United States Supreme Court, October Term 1987, No. .....; on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Gerald Goldfarb
Suite 1418
3550 Wilshire Boulevard
Los Angeles, CA 90010

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on November 25, 1987, at Los Angeles, California



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